SUPREME COURT, U. S.

DEC 22 1958

JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 91

RAY CASH,

PETITIONER,

v.

R. O. CULVER, State Prison Custodian,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

We state as follows the three questions presented:

QUESTION ONE

WHETHER OR NOT PETITIONER WAS DENIED DUE PROCESS OF LAW BY NOT HAVING COUNSEL APPOINTED FOR HIM IN A NON-CAPITAL CASE?

QUESTION TWO

WHERE PETITIONER FAILS TO SHOW THAT THE DENIAL OF HIS MOTION FOR CONTINUANCE RE-

QUESTING ADDITIONAL TIME TO ENGAGE COUNSEL CONSTITUTED AN ABUSE OF DISCRETION, IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES VIOLATED SO AS TO ENTITLE THE PETITIONER TO A WRIT OF HABEAS CORPUS?

QUESTION THREE

ARE IMPRESSIONS OF NEWSPAPER REPORTERS CONCERNING THE EVENTS THAT TRANSPIRED AT PETITIONER'S RETRIAL PROPER FOR CONSIDERATION AS ALLEGATIONS IN SUPPORT OF PETITIONER'S CLAIM OF AN UNLAWFUL IMPRISONMENT?

STATEMENT OF THE CASE

In 1957, petitioner filed his petition for writ of habeas corpus in the Supreme Court of Florida (R. 1-19), the denial of which is now under review. In said petition, it is alleged that petitioner's present incarceration is in violation of the Fourteenth Amendment to the Constitution of the United States of America (R. 1).

On December 10, 1957, said petition was denied without opinion. The order of denial recited that: "The above named petitioner has filed a petition for Writ of Habeas Corpus, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied" (R. 20).

On June 9, 1958, this Court entered its order granting petitioner's motion for leave to proceed *in forma pauperis;* and granted petitioner's petition for writ of certiorari, seeking a review of the above order of the Supreme Court of Florida (R. 21).

SUMMARY OF ARGUMENT

ONE

The petition for writ of habeas corpus filed in the Supreme Court of Florida reflects that petitioner was possessed of sufficient intelligence to adequately defend himself against a charge of breaking and entering with the intent to commit a felony. Said petition reflects that petitioner had adequate knowledge of trial procedures and was, in fact, subjected to a previous trial in a criminal court on the same issues involved in the instant case.

TWO

Petitioner has failed to show that the trial court's denial of his motion for continuance constituted an abuse of judicial discretion so as to constitute a deprivation of due process of law. His petition for writ of habeas corpus reflects that efforts were made to secure counsel for petitioner. Petitioner's mother spoke to a number of lawyers but was unable to persuade anyone to represent her son in the trial of this cause. Petitioner does not allege nor does his petition for writ of habeas corpus reflect that any further efforts to secure counsel would have met with success.

It is pointed out that although the petitioner did not personally attempt to engage counsel, such attempts were made on his behalf by his mother.

In light of the Florida rule that motions for continuance in a criminal case must be subjected to careful scrutiny because of the temptation to delay, the trial court was more than justified in denying petitioner's motion for continuance.

THREE

Recognizing that the petition for writ of habeas corpus

involved herein should not be subjected to rigid rules of pleading required in other proceedings, we do not take issue with petitioner's position relative to the newspaper accounts of his trial as set forth in his petition for writ of habeas corpus. However, said newspaper accounts do not reflect that petitioner was deprived of a fair trial. These quotations from a local periodical indicate that efforts were made to secure counsel to represent petitioner; that he had knowledge of trial procedures used in a criminal court and was able to protect his interests in the trial below.

ARGUMENT

ONE

PETITIONER WAS NOT ENTITLED TO HAVE COUNSEL APPOINTED TO REPRESENT HIM IN A NON-CAPITAL PROSECUTION AS A MATTER OF RIGHT UNDER AMENDMENT FOURTEEN OF THE CONSTITUTION OF THE UNITED STATES IN THAT THE LAW OF FLORIDA DOES NOT REQUIRE SUCH APPOINTMENT IN NON-CAPITAL CASES WHERE NO INCAPACITY IS SHOWN TO HAVE EXISTED REQUIRING APPOINTMENT OF COUNSEL.

Petitioner's contention is truly without merit in that there existed no incapacity on his part to vitiate the proceedings in which he represented himself without counsel. Having failed to establish any such incapacity and since there is no absolute duty under Florida law that counsel be furnished a defendant, except when the defendant is insolvent and is subjected to a prosecution for a capital offense, petitioner's position must fail as a matter of law (*Betts v. Brady*, 316 U. S. 455; *Powell v. Alabama*, 287 U. S. 45; *Palko v. Connecticut*, 302 U. S. 319; *Sneed v. Mayo* (Fla.), 66 So. 2d 865; *Johnson v. Mayo*, 158 Fla. 264, 28 So. 2d 585; *Section 909.21, Florida Statutes*).

Moreover, this Court is committed to the proposition under a long array of precedent as precisely expressed in the relatively recent decision of *Carter v. Illinois*, 329 U. S. 173, to the effect that each state has the right to establish its own rules of criminal procedure, provided they do not deny fundamental guarantees of due process. When such is analyzed in light of this Court's holding in *Wade v. Mayo*, 334 U. S. 672, we respectfully submit that no violation of petitioner's rights exists.

Such duty as may rest on the Florida courts to furnish counsel in criminal cases less than capital arises by virtue of the Fourteenth Amendment to the Constitution of the United States, and it imposes no absolute requirement that counsel be furnished, unless the accused is incapable of representing himself adequately at trial on account of age, ignorance or lack of mental capacity *(Powell v. Alabama*, supra.)

It is only where lack of counsel would deprive a defendant of a fair trial is there created a duty to appoint counsel to represent such a defendant *(Betts v. Brady*, 316 U. S. 455).

Petitioner asserts before this Court that in view of his age, established as being 20 years at the time of his trial, and the fact that he is uneducated, he was not able to adequately defend himself during the trial below (R. 3, 11, 13). He attempts to establish in his brief that the issues involved in his trial were of such a complex nature that he should not have been expected to be capable of defending without aid of counsel.

It is respectfully submitted that an examination of the petition for writ of habeas corpus filed in the Supreme Court of Florida reduces petitioner's contention to a nullity.

The showing made on the face of that instrument rebuts any allegation that petitioner was an inexperienced youth, incapable of adequately representing himself. It is revealed that this petitioner was sufficiently astute to request a continuance in an attempt to delay his trial and make some further effort to obtain counsel to represent him (R. 2). His colloquy with the trial judge concerning the circumstances surrounding the withdrawal of his attorney manifests some knowledge of criminal procedures as used in criminal trials (R. 2). Moreover, it is revealed most clearly that petitioner could not be totally unfamiliar with criminal procedure as he asserts, inasmuch as he was previously subjected to a criminal trial involving the same issues presented in the cause of which he now complains (R. 3).

Moreover, even if petitioner had no previous trial experience, such cannot be deemed an element fatal to his conviction. It in no way rebuts the presumption of the validity of his trial and clearly does not indicate any element of *extreme youth, ignorance* or *mental incapacity* on his part which might be construed as evidence of his inability to adequately defend himself.

Petitioner recites in his petition that certain incidents occurring during his trial were reported in a local newspaper (R. 3, 12, 14-15). He relies on the personal observations made by the author of these articles to establish that he was unable to adequately defend himself. It is submitted that, even if true, these personal observations by an observer at the proceedings had in the trial court, phrased in such a manner so as to attract the eye of the reading public, can form no basis for petitioner's contention in terms of any denial of due process of law under the Fourteenth Amendment.

These statements, even if true, furnish a reasonable basis to infer that petitioner did know when to object, was not deprived of an opportunity to do so, and could adequately

represent himself during his trial, although admittedly not in a professional manner. However, the inability to represent oneself as capably as an attorney does not establish a valid infirmity rendering petitioner's conviction void. To hold otherwise would require the appointment of counsel in all cases, capital or non-capital, arising in Florida courts, such being contrary to the law of Florida and the decisions of this Court.

In an effort to establish that the instant prosecution was of such a complex nature that petitioner could not adequately defend himself, petitioner points to the existence of several defensive tools or procedures that Florida law makes available to any defendant. It is petitioner's contention that without counsel, he could not avail himself of these trial implements.

Petitioner first points to the fact that the instant prosecution was based on accomplice testimony. He asserts that Florida law requires that a jury be advised of the suspect quality of accomplice testimony, and that petitioner could not have known of such a rule.

There is nothing in the record to indicate that the trial court did not charge the jury as required by Florida law. In light of petitioner's failure to so contend before the Supreme Court of Florida, it must be presumed that the trial court performed its duty and properly charged the jury as to the law of the case. Petitioner did not allege in the Florida Court that he was unaware of such a rule, or that such an instruction was not given.

Moreover, petitioner did not allege before the Supreme Court of Florida that he was prevented from cross-examining his accomplice, and again, it must be presumed that he was permitted to make such a cross-examination.

It must be remembered that this cause was before the Supreme Court of Florida on a petition for writ of habeas

corpus. In such proceedings, in the absence of an allegation to the contrary, it must be presumed that the trial court performed its duty and the trial was conducted in a proper manner. The conclusions arrived at by petitioner in his brief are not sufficient to overcome the fact that such allegations were not made before the Supreme Court of Florida. This Court should not read into the petition allegations that are not set forth therein. The ruling of the Supreme Court of Florida should not be weighed upon the basis of a matter which was not before that Court for consideration.

Petitioner next points to the admission of testimony concerning his participation in crimes other than the crime involved in the instant prosecution. It has long been the law in Florida that testimony relating to other crimes is admissible for the purpose of identifying the defendant; or proving the plan, intent or knowledge of the defendant; or to show that the acts charged against him were not the result of accident, mistake, or inadvertence (*Nickels v. State,* 90 Fla. 659, 106 So. 479, 488; *Wallace v. State,* 41 Fla. 547, 26 So. 713; *Bronson v. State,* 117 Fla. 828, 158 So. 435; *Wilson v. State,* 134 Fla. 199, 183 So. 748; *Talley v. State,* 160 Fla. 593, 36 So. 2d 201).

It is petitioner's contention that the above rule is conditioned to the effect that testimony of other crimes is admissible in a prosecution based on accomplice testimony *only* where there is evidence *other* than that of the accomplice to connect the accused to the principle crime charged. In support of his position, he cites to this Court the case of *Padgett v. State* (Fla.), 53 So. 2d 106. An examination of the *Padgett case,* supra, reflects most clearly that petitioner has misconstrued the reasoning set forth by the Supreme Court of Florida in that case. The rule in Florida is clear. Accomplice testimony need not be corroborated in order to sustain a conviction (*Bacon v. State,* 22 Fla. 52;

Hatcher v. State, 74 Fla. 112, 76 So. 694; *Land v. State* (Fla.), 59 So. 2d 370). The decision of the Supreme Court of Florida in *Padgett v. State*, supra, does not constitute an exception to that rule. In the *Padgett case*, supra, the Florida Court simply recognized that before evidence of other crimes could be admitted in evidence, there must be some evidence connecting an accused with the principle crime charged. The Supreme Court of Florida simply concluded in the *Padgett case*, supra, that no such connection existed. A careful reading of the decision in that case reflects that the Supreme Court of Florida's order of reversal was based on the fact that neither the testimony of the defendant's accomplice nor other witnesses connected the defendant with the charged crime.

The Supreme Court of Florida concluded that had there been *any* evidence to connect the defendant with the principle crime, testimony regarding other burglaries might have been admissible. The decision in *Padgett v. State*, supra, reflects that there was no testimony, accomplice or otherwise, to connect the defendant with the principle crime. The Florida Court did not adopt a rule that would exclude testimony of other crimes simply because the evidence connecting a defendant with the principle crime came from an accomplice witness. This is manifested by the language adopted by the Supreme Court of Florida in *Padgett v. State*, supra, at Page 108:

> "(2) In the instant case there is not an iota of testimony except Walden's (accomplice witness) to connect the defendant with the crime for which he is charged. Walden claimed that the defendant had helped him to select the places to be burglarized, had gone with him in advance of the burglaries to each of the locations to look over the lay of the land, and had been his get-away man in each instance. *Had there been any evidence of defendant's doing any of these three acts in the Robbins case* (the principle crime charged) *testi-*

mony regarding the other two burglaries might have been admissible to show his intention in the Robbins case, see State v. Valwell, 66 Vt. 558, 29 A. 1018, but there was no such evidence.'' (Parenthetical matters and Emphasis supplied)

Petitioner did not allege that the accomplice testimony was not sufficient to connect petitioner with the instant crime, thus, it must be presumed that Allen's testimony sufficiently connected petitioner to the crime charged herein. Therefore, evidence concerning petitioner's participation in other crimes of similar nature was admissible to establish plan, motive or intent to commit the principle crime (*Padgett v. State*, supra, and cases cited therein).

Moreover, petitioner alleged before the Supreme Court of Florida that Allen's testimony *was* corroborated (R. 12). Thus, Allen's testimony did not stand alone. The prosecutor did call witnesses to corroborate Allen's account of the crime (R. 12).

Petitioner's plea that this Court construe the Due Process Clause of the Fourteenth Amendment so as to require the appointment of counsel in all cases involving a retrial after a hung jury is contrary to this Court's decisions in numerous cases. In *Foster v. Illinois*, 332 U. S. 134, 136-137, this Court stated:

> ''''*Prosecutions in State courts are not subject to this fixed requirement. So we have held upon fullest consideration. Betts v. Brady*, 316 US 455, 86 L ed 1595, 62 S Ct 1252, supra. But process of law in order to be 'due' does require that a State give a defendant ample opportunity to meet an accusation. And so, in the circumstances of a '*particular situation*,' assignment of counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence. Palko v. Connecticut, supra (302 US at 327, 82 L ed 293, 58 S Ct 149.)''''(Emphasis supplied)

The necessity for court-appointed counsel for an indigent defendant must be determined after an examination of the circumstances surrounding each individual case. The Fourteenth Amendment does not establish a fast rule to be applied in every case.

When the petition for writ of habeas corpus as presented to the Supreme Court of Florida is examined, it is revealed that petitioner failed to establish that under Florida law he had a right to appointed counsel. When his contradictory allegations are reconciled, it is revealed that he rebuts any contention that he was not able to adequately defend himself in the trial below. The cause being before the Florida Court on a petition for writ of habeas corpus, it was incumbent upon the petitioner to establish that a writ of habeas corpus should issue. The instrument filed in the Supreme Court of Florida fails to make such a showing.

Petitioner's argument reflects no more save a lack of legal training. If such argument be accepted, it would be contrary to the well-reasoned opinions of this Court. Petitioner's reasoning would require the appointment of counsel by state courts in all criminal cases where the defendant is not trained in the law. Such is not the law in Florida and not the rule set forth by this Court. In *Betts v. Brady*, 316 U. S. 455, this Court stated at Page 473:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, *we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court,* can be fairly conducted and justice accorded a defendant who is not represented by counsel." (Emphasis supplied)

TWO

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

This Court is committed to the rule that each state has the right to establish its own rules of criminal procedure, provided they do not deny fundamental guarantees of due process *(Carter v. Illinois,* 329 U. S. 173).

Chapter 916, Florida Statutes, prescribes the procedures controlling a motion for continuance, and establishes most clearly that the granting or denial of a motion for continuance is a matter vested in the sound discretion of the trial court *(Acree v. State,* 153 Fla. 561, 15 So. 2d 262; *Brunke v. State,* 160 Fla. 43, 33 So. 2d 226; *London v. State* (Fla.), 48 So. 2d 926). According to the law of Florida, the determination of whether a trial judge erred in refusing to grant a continuance must be based on the facts of the particular case and an abuse of discretion must be clearly shown *(Wadsworth v. State,* 136 Fla. 134, 186 So. 435).

In light of this clearly established rule, it was incumbent upon the petitioner to show in the Supreme Court of Florida that the actions of the trial court were an abuse of judicial discretion resulting in a denial of due process of law.

It is respectfully submitted that the showing made by petitioner's application for writ of habeas corpus clearly rebuts the assertion that petitioner's detention is in any manner unlawful and thus the Supreme Court of Florida was justified in denying his petition for writ of habeas corpus. In *State ex rel. Davis v. Hardie,* 108 Fla. 133, 146

So. 97, the Supreme Court of Florida set forth the rule to be followed in Florida:

> "(4) While habeas corpus may issue on a very informal application (Pounds v. Darling, 75 Fla. 125, 77 So. 666, L. R. A. 1918E, 949; Ex parte Pells, 28 Fla. 67, 9 So. 833), the writ itself should not be allowed where the petition for habeas corpus shows on its face facts conclusively rebutting the petitioner's assertion that his imprisonment is unlawful. Hanley v. State, 50 Fla. 82, 39 So. 149."

Petitioner, while represented by counsel, was placed on trial for breaking and entering with the intent to commit a felony, said trial resulting in a mistrial because of the jury's inability to arrive at a verdict (R. 2). While confined in the Florida State Prison awaiting retrial, petitioner was informed that his attorney intended to withdraw from the case and did subsequently withdraw (R. 2). On the day of his second trial, petitioner requested a continuance in order that he could secure another attorney to represent him (R. 2). Petitioner contends in his application for writ of habeas corpus that because of his close confinement in the Florida State Prison and the withdrawal of his counsel, the trial court's denial of his motion for a continuance constituted a deprivation of his right to due process of law under the Fourteenth Amendment to the Constitution of the United States (R. 3).

When the factual averments contained in the petition for writ of habeas corpus are examined, it is revealed that one week prior to the date of his second trial, petitioner was made aware of his attorney's intention to withdraw (R. 2), and that four days prior to said retrial, he was informed of his attorney's actual withdrawal (R. 2). Nowhere in his petition does he allege that he indicated to the officials at the Florida State Prison that he desired to *personally* communicate with an attorney, or that any such request was refused.

His petition reveals further that during the week preceding petitioner's second trial, his mother was aware of petitioner's loss of counsel and did make efforts to secure another attorney to defend her son (R. 3-4). It is revealed that her efforts to secure such legal counsel were futile and a reading of the petition for writ of habeas corpus fails to reflect that even if afforded an additional reasonable period of time would her efforts prove to be successful. Thus, in the face of these facts and the trial court's proper determination that petitioner was capable of representing himself, and recognizing that both the state and a defendant have a right to a speedy trial, the trial judge properly refused to delay the proceedings any further *(Section 916.01, Florida Statutes)*. Moreover, it is clearly the rule in Florida that motions for a continuance in criminal cases are to be more closely scrutinized than in civil cases because of the greater temptation to delay *(Açree v. State*, supra).

Petitioner has failed to show that any further efforts to secure counsel would prove successful. He does not show that he or his mother had sufficient funds to employ an attorney, or that they had a particular attorney under consideration, and as such, a reasonable delay in the trial could result in his employment. In fact, as shown above, it is clearly revealed that any further efforts to secure counsel would have been futile and the granting of petitioner's motion for continuance would constitute an unwarranted delay of the trial.

The petitioner's allegation that his motion was denied only because the State had gone to great expense to marshall its witnesses is refuted by the record.

Petitioner has completely overlooked the fact that his mother had made attempts to secure an attorney on his behalf, and in light of his confinement would be the logical person to so endeavor (R. 3). The fact that petitioner could

not personally inquire of an attorney's desire to represent him cannot destroy the fact that reasonable time was allowed his mother in her efforts to secure an attorney. It must be presumed that the trial judge took into consideration all the circumstances surrounding counsel's withdrawal, petitioner's confinement, the efforts already made to secure another attorney, and the nature of the offense, in determining whether the trial should be further delayed. It must be presumed that his final determination was a proper exercise of judicial discretion in face of petitioner's failure to show otherwise.

If petitioner's reasoning were adopted, any person who was held in custody awaiting trial could delay his trial by the simple expedient of requesting a continuance in order to secure counsel, even though other persons had made efforts to secure counsel on his behalf.

In conclusion as to this point, respondent submits that the denial of petitioner's application for writ of habeas corpus was most proper. Petitioner's petition fails to show any such abuse of the trial court's discretion that would warrant the issuance of a writ of habeas corpus. Moreover, his application for writ of habeas corpus reveals on its face that no such abuse of discretion exists.

THREE

UNDER THE LIBERAL RULE ADOPTED IN RELATION TO THE FORM OF PLEADINGS IN A HABEAS CORPUS PROCEEDING, PETITIONER'S ADOPTION OF NEWSPAPER ACCOUNTS RELATING TO WHAT TRANSPIRED AT HIS TRIAL COULD BE CONSIDERED DIRECT ALLEGATIONS OF THE PETITIONER HIMSELF.

Respondent does not contend that the newspaper accounts of petitioner's trial should be disregarded by this Court in

determining if his petition for writ of habeas corpus presented sufficient grounds to warrant the issuance of a writ of habeas corpus.

However, we submit that said newspaper accounts reflect simply that the petitioner's incapacity to defend himself was limited solely to an inability to do same with the same degree of skill that would be expected from an experienced member of the bar.

Petitioner's references to the local press indicate that petitioner was aware that he had a right to object to the introduction of any evidentiary matter he thought was subject to objection and that he did voice such objections, although admittedly not in a professional manner (R. 14-15).

These newspaper accounts reflect further that a week prior to the date of his retrial, petitioner was aware of his counsel's intention to withdraw. Moreover, they reflect that his mother did make a diligent search in an attempt to secure another attorney (R. 2-3). It is pointed out that neither petitioner's allegations nor his adopted allegations reflect that a further delay of his trial would enable his mother to secure counsel to represent him in his pending trial (R. 2-3).

In conclusion to this point, we respectfully submit that even if the newspaper accounts of petitioner's trial are considered as part of the record herein, petitioner has failed to establish anything save his inability to defend himself with the same degree of proficiency an appointed or chosen counsel may have utilized. Petitioner has failed, however, to establish that he was not capable of protecting his interests. It is pointed out that even amongst members of the bar, degree of ability will vary. A petitioner not satisfied with his chosen or court-appointed counsel could not complain that another counsel could have handled his case in a

better manner. The fact that petitioner is not trained in the law does not constitute sufficient grounds to require that a trial court in the State of Florida, appoint counsel to represent an indigent defendant in a non-capital prosecution. Moreover, such a situation does not require a trial court to grant a motion for continuance in order to procure counsel where the record shows that efforts were made to obtain counsel for the defendant and that such efforts were to no avail. The record fails to reflect that the granting of additional time to search the roster of the Florida Bar in an effort to persuade some attorney to take the case, would uncover an attorney willing to defend petitioner in the trial below.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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Attorney General

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EDWARD S. JAFFRY
Assistant Attorney General
COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of Florida, certify that on the 19th day of December, 1958, I served copies of the foregoing Brief for Respondent upon petitioner by mailing the same air mail with postage prepaid to petitioner's counsel, the Honorable Irwin L. Langbein, addressed to him at his post office address viz; 205 Datura Street, West Palm Beach, Florida.

.....

RICHARD W. ERVIN
Attorney General of Florida